No. 95-1696

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JOHN CHARNEY, ALICE CHARNEY, JOHN CHARNEY, JR. and BRIAN CHARNEY, a Minor, by JOHN CHARNEY, his Guardian,

Petitioners,

vs.

ELAINE B. PANITZ, M.D.,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to grant review pursuant to 28 U.S.C. § 1257 when the petitioners never raised any federal constitutional issue in the trial court, in the intermediate appellate court, or in the Pennsylvania Supreme Court concerning expert immunity and when the Supreme Court of Pennsylvania never decided any issues in the case?

2. Should this Court grant review to consider the applicability of a common law immunity based solely on Pennsylvania common law when no federal constitutional claim exists?

3. Should this Court review the constitutionality of witness immunity when utilized to bar a state law claim when it has already determined in *Briscoe v. LaHue*, 460 U.S. 325 (1983) that witness immunity bars a constitutional claim brought pursuant to 42 U.S.C. § 1983?

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction over this case pursuant to 28 U.S.C. § 1257(a) because the petitioners never presented their federal constitutional claims relating to expert immunity to any state court and because the Pennsylvania Supreme Court refused to address any issue raised by the petitioners.

STATEMENT OF THE CASE

John Charney, Alice Charney, John Charney, Jr. and Brian Charney, a minor by John Charney as Guardian (hereinafter referred to as "the Charneys") ask this Court to usurp the very basic right of state courts to determine their own common law immunities when dealing with state law causes of action. They attempt to create a constitutional claim where none exists. The Charneys never properly raised any constitutional issue in the courts below. None of the courts below ever dealt with the Charneys nonexistent constitutional claim because no one ever presented it to them.

The Charneys filed an amended complaint against Elaine B. Panitz, M.D. (hereinafter referred to as "Dr. Panitz") alleging that Dr. Panitz negligently provided expert testimony for them in a case in which they were plaintiffs. (Petitioners' Appendix 12a). The amended complaint of the Charneys attempted to assert causes of action against Dr. Panitz based on breach of contract, negligence, negligent misrepresentation and gross negligence. (Petitioners' Appendix 12a to 27a). Despite the assertion of the Charneys in their brief in this Court, they *never* set forth a cause of action based on fraud or fraudulent inducement against Dr. Panitz. An examination of the amended complaint shows no such allegations anywhere. (Petitioners' Appendix 12a to 27a). No factual averment of fraud appears anywhere in the amended complaint. (Petitioners' Appendix 12a to 27a).

The Charneys allege that Dr. Panitz promised to present specific testimony at trial in the case of *Charney v. Crawford Construction Co.*, Westmoreland County, No. 5306, 1984 (Petitioners' Appendix 17a, 18a). The Charneys contended that Crawford Construction Co. injured them by exposing them to formaldehyde. (Petitioners' Appendix 12a to 27a). Although Dr. Panitz testified for the Charneys at trial, she failed to answer certain cross-examination questions in the way that she had allegedly represented to the Charneys that she would. (Petitioners' Appendix 15a). Based on the courtroom testimony of Dr. Panitz, the Charneys seek damages consisting of what they would have recovered from Crawford Construction Co. if Dr. Panitz had provided the testimony that she allegedly promised. The Charneys also request the legal fees and expenses they incurred in bringing their case against Crawford Construction Co. and the fees they paid to Dr. Panitz. The Charneys contend that they lost their case at trial against Crawford Construction Co. because of the testimony of Dr. Panitz. (Petitioners' Appendix 12a to 27a).

Dr. Panitz filed preliminary objections to the amended complaint of the Charneys claiming that she had an absolute privilege protecting what she said at trial and prior to trial regardless of her motivation or intent. (Petitioners' Appendix 33a). After permitting extensive briefing by the Charneys and Dr. Panitz and after conducting oral argument, the Honorable Bernard F. Scherer, Judge of the Court of Common Pleas of Westmoreland County, granted the preliminary objections of Dr. Panitz based on the absolute privilege as applied by the Superior Court of Pennsylvania in this identical case in *Panitz v. Behrend,* 429 Pa. Super. 273, 632 A.2d 562 (1993) (Petitioners' Appendix 7a). The Superior Court affirmed the decision of Judge Scherer and remanded for the imposition of attorney's fees against the Charneys. *See Charney v. Panitz,* Superior Court of Pennsylvania No. 02033 Pittsburgh, 1993. (Petitioners'

Appendix 3a). The Charneys submitted a petition for allowance of appeal to the Supreme Court of Pennsylvania, which the Supreme Court of Pennsylvania granted on March 6, 1995. After reviewing briefs on the merits and hearing oral argument the Supreme Court of Pennsylvania on January 18, 1996 declined to decide the matter. Instead, the Supreme Court of Pennsylvania dismissed the appeal "as having been improvidently granted." (Petitioners' Appendix 1a). The Supreme Court of Pennsylvania never decided any of the issues presented by the Charneys. Instead, the Supreme Court of Pennsylvania concluded that it should not exercise its discretionary jurisdiction to hear the matter.

The law firm of Behrend & Ernsberger, which currently represents the Charneys in this case, also represented the Charneys in their unsuccessful case against Crawford Construction Co. Behrend & Ernsberger filed a counterclaim against Dr. Panitz in a suit she commenced for expert witness fees in the Court of Common Pleas of Allegheny County relating to the testimony that she provided for the Charneys in their case against Crawford Construction Co. The counterclaim of Behrend & Ernsberger alleged identical causes of action against Dr. Panitz for the identical conduct and testimony in the same case as now asserted by the Charneys in their lawsuit before this Court.

The Honorable R. Stanton Wettick, Jr., Judge of the Court of Common Pleas of Allegheny County, granted Dr. Panitz's preliminary objections to the counterclaim of Behrend & Ernsberger based on Dr. Panitz having an absolute privilege. *Panitz v. Behrend,* 141 P.L.J. 203 (1993). Behrend & Ernsberger appealed Judge Wettick's decision to the Superior Court of Pennsylvania. The Superior Court in *Panitz v. Behrend, supra,* 632 A.2d 562 (1993) held that the absolute privilege for a witness

in a judicial proceeding applied to an expert's testimony at trial and to the representations made by the expert prior to trial.

Behrend & Ernsberger appealed the Superior Court's decision by means of a petition for allowance of appeal to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania denied that petition.

The Superior Court in *Charney v. Panitz,* relied upon its decision in *Panitz v. Behrend, supra,* 632 A.2d 562, a mere seven months before, to impose attorneys fees against the Charneys based on Pennsylvania Rule of Civil Procedure 2744. That rule permits the Superior Court to award attorneys fees for a frivolous appeal. The Superior Court concluded that because of its prior decision in the identical case seven months before, the appeal was frivolous since the realistic chances of ultimate success were slight and the continuation of the contest was unreasonable. (Petitioners' Appendix 4a). The Superior Court remanded the case to the trial court to assess the amount of counsel fees. The trial court never did so because of the Charneys' appeal to the Pennsylvania Supreme Court.

The Charneys attached to their amended complaint as an exhibit a three page extract of deposition testimony Dr. Panitz gave in an unrelated law suit which the Charneys called the "Crown Point" litigation (hereinafter referred to as the "Crown Point deposition"). (Petitioners' Appendi 29a to 31a). Allegedly relying on the extracted pages of the Crown Point deposition, the Charneys, through their attorneys Behrend & Ernsberger, acquired their understanding of what Dr. Panitz would testify to at the Charneys' trial with respect to formaldehyde sensitization in tobacco smokers. The Charneys relied solely on these pages in the Crown Point deposition for all of their claims set forth in their amended complaint against Dr. Panitz. (Petitioners' Appendix 17a, Paragraph 27). Their entire amended complaint

arises from these pages and the trial testimony of Dr. Panitz. (Petitioners' Appendix 13a to 17a).

The three page excerpt from the Crown Point deposition contains several reservations and expressions of uncertainty with respect to formaldehyde sensitization among tobacco smokers. For example, Dr. Panitz stated:

> . . . it is my understanding that the 40 parts per million represents the formaldehyde generated in, say, a room where there is a cigarette being smoked . . . *I'm not sure* that that means the individual is pulling in 40 parts per million formaldehyde into his lungs. *I don't personally know* what the concentration is when you're pulling it into their lungs.

(Petitioners' Appendix 29a) (emphasis added).

> . . . *I cannot explain* why certain of the individuals who I believe are sensitized to formaldehyde do not react to cigarette smoke when they smoke. *It's possible* that they do react and they are suppressing the symptoms and don't wish to recognize that the cigarette smoke is bothering them, *that's possible, but I otherwise can't explain it.*

(Petitioners' Appendix 31a) (emphasis added).

The Charneys fail to allege in their amended complaint that Dr. Panitz testified falsely at trial or that she deliberately withheld testimony at trial because of malice or fraud. (12a to 27a, Petitioners' Appendix). Nor do the Charneys allege that Dr.

Panitz failed to appear at trial when required. (Petitioners' Appendix 12a to 27a).[1]

REASONS FOR DENYING THE WRIT

I.

PETITIONERS NEVER RAISED ANY FEDERAL CONSTITUTIONAL ISSUE IN THE TRIAL COURT, IN THE SUPERIOR COURT OR IN THE PENNSYLVANIA SUPREME COURT.

The Charneys never presented any federal constitutional question to the trial court in this case. The preliminary objections of Dr. Panitz raised the issue of witness immunity. (33a, Petitioners' Appendix). In response the Charneys failed to present any constitutional argument concerning witness or expert immunity.

On appeal to the Superior Court of Pennsylvania the Charneys never raised any federal constitutional issue. They presented the following "Statement of the Questions Involved" to the Superior Court:

> I. WHETHER THE TORTIOUS ACTS OF AN EXPERT, COMMITTED TO ENGAGE AND RETAIN THE EXPERT'S EMPLOYMENT BY A LITIGANT AND/OR THEIR COUNSEL IN A CIVIL ACTION, SHOULD

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1. Although Dr. Panitz, for purposes of her preliminary objections only, conceded the truthfulness of the accusations set forth in the amended complaint, she vigorously denies that she ever made any misrepresentations to the Charneys or their attorneys. She also vigorously denies that she changed her testimony at trial.

BE EXCUSED FROM CIVIL LIABILITY BECAUSE, OR IF, THAT EXPERT SUBSEQUENTLY TESTIFIES AT THE LITIGANT'S TRIAL.

Answered in the Affirmative by the Court below.

II. WHETHER WITNESS IMMUNITY FROM CIVIL LIABILITY FOR COMMUNICATIONS IN JUDICIAL PROCEEDINGS SHOULD BE EXPANDED SO AS TO INCLUDE EVEN THE PRELIMINARY, INITIAL CONTACT BETWEEN AN EXPERT AND A PARTY, BEFORE THE EXPERT IS HIRED TO TESTIFY OR BEFORE A FINAL DECISION HAS BEEN MADE BY THE PARTY AS TO WHETHER THE EXPERT WILL TESTIFY AS A WITNESS.

Answered in the Affirmative by the Court below.

III. WHETHER AN EXPERT WITNESS, WHO REPRESENTS THEIR EXPERT OPINION TO BE ONE THING, AND IS THEN RETAINED BY A PARTY AND/OR THEIR ATTORNEY TO TESTIFY ON THAT PARTY'S BEHALF AT TRIAL, HAS A DUTY TO INFORM THE HIRING PARTY AND/OR THEIR ATTORNEY OF A CHANGE IN THAT EXPERT'S OPINION FROM WHAT HAD BEEN REPRESENTED, PRIOR TO TRIAL, SO THAT

PARTY AND THEIR ATTORNEY CAN MAKE INFORMED DECISIONS REGARDING THE CONDUCT OF THAT PARTY'S CASE INCLUDING THE POSSIBLE SETTLEMENT THEREOF.

Answered in the Negative by the Court below.

IV. WHETHER IN GRANTING WITNESS IMMUNITY FROM CIVIL LIABILITY FOR COMMUNICATIONS MADE PRIOR TO TRIAL, THE COURT SHOULD MAKE A DISTINCTION BETWEEN, AND APPLY DIFFERENT STANDARDS TO, EXPERT WITNESSES AND FACT WITNESSES.

Answered in the Negative by the Court below.

(Respondents' Appendix 1a to 2a).

Not an inference of a federal constitutional issue appears in the "Statement of the Questions Involved" presented by the Charneys to the Superior Court of Pennsylvania. An examination of the Charneys brief submitted to the Superior Court shows a one sentence mention of a federal constitutional claim without any citations or any indication of the nature of the constitutional claim. Because of the failure of the Charneys to raise any constitutional issue, the Superior Court never dealt with it in its opinion. (Petitioners' Appendix 3a). The Superior Court lacked the ability to decide what the Charneys had never presented to it.

The same situation existed in the Supreme Court of Pennsylvania. The Charneys submitted the following

"Statement of the Questions Involved" to the Supreme Court of Pennsylvania:

> I. Substantiative Question of First Impression: Should the Supreme Court of Pennsylvania extend the privilege of witness immunity beyond the traditional approach accepted in this Commonwealth where a witness that is adverse cannot be sued in a subsequent action for defamation, defamation-type claim or a retaliatory type claim based upon the adverse testimony, to include a professional who agrees to serve as an advocate for the party's position and to provide litigation-related services for compensation, if there is professional negligence in providing the agreed services?
>
> ANSWER: In the Affirmative by the Superior Court.
>
> II. Additional Substantive Question of First Impression: Should the Superior Court of Pennsylvania be permitted to assess a party counsel fees for appealing a case to the Superior Court when the controlling and deciding issue is an issue of first impression, and has never (sic) decided by the Supreme Court of Pennsylvania?
>
> ANSWER: In the Affirmative by the Superior Court.
>
> III. May the Trial Court affirmed by the Superior Court, make a factual finding,

> essential to its decision, which is not contained in and is contrary to the pleadings of Appellant-Plaintiff, where the only facts before the Court are pleadings, there having been no testimony?
>
> ANSWER: In the Affirmative by the Superior Court.

(Respondents' Appendix 3a to 4a).

An examination of the statement shows no mention of any constitutional claim concerning expert immunity.

The same defect exists concerning the Charneys contention relating to attorneys fees. They never raised any federal constitutional claim in their "Statement of the Questions Involved" before the Supreme Court of Pennsylvania. (Respondents' Appendix 3a to 4a). They only raised the issue of a constitutional violation concerning attorneys' fees in a footnote to their brief. They submitted no case authority to support their position. The Supreme Court of Pennsylvania declined to rule on their claim. (Petitioners' Appendix 1a).

This Court refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in that court. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992)(in reviewing judgments of state courts under 28 U.S.C. §1257 the Court will refuse to consider claims that were not raised or addressed below). *See also, Beck v. Washington*, 369 U.S. 541, 549-53 (1962)(because petitioner failed to argue equal protection in state court, question was not before the Supreme Court). Here the Charneys failed to present their constitutional claim to the Supreme Court of Pennsylvania. The Pennsylvania Supreme Court *refused to consider any claim advanced by the Charneys.* (Petitioners' Appendix 1a).

The Charneys ask this Court to decide a constitutional claim that they neglected to raise in the trial court, in the intermediate appellate court or in the Supreme Court of Pennsylvania. No party to the litigation ever submitted an argument concerning the constitutional violations now alleged for the first time in this Court by the Charneys. No state court judge or state court justice ever had the opportunity to consider the constitutional claim now presented by the Charneys.

The Charneys ask this Court to decide their constitutional arguments for the first time without the benefit of an adequate record reflecting litigation of the constitutional challenge and without the benefit of either a trial court or appellate decision considering the constitutional challenge. The Charneys request that this Court decide their constitutional claim in a vacuum. As a court of last resort this Court refuses to function in such a manner. The Charneys cannot litigate a multitude of other issues relating to the law of the Commonwealth of Pennsylvania without any federal constitutional dimension and then at the last moment when all else has failed raise a federal constitutional issue before this Court for the first time.

II.

THE PENNSYLVANIA SUPREME COURT NEVER DECIDED THE CLAIM OF THE PETITIONERS, BUT EXERCISED ITS DISCRETIONARY AUTHORITY TO DECLINE REVIEW AFTER HAVING HEARD ORAL ARGUMENT AND EXAMINING BRIEFS ON THE MERITS.

Rule 10(b) of the rules of this Court set forth as one of the Court's considerations in granting certiorari whether:

> . . . a state court of last resort has decided an

> important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; . . . .

The Charneys rely upon this provision to support their petition for certiorari. But, the state court of last resort, the Pennsylvania Supreme Court, never decided any of the issues presented by the Charneys to the Pennsylvania Superior Court or to this Court. (Petitioners' Appendix 1a). The Pennsylvania Supreme Court decided nothing in this case. It only determined not to review the matter. Consequently, no state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or with a decision of the United States Court of Appeals. No basis exists for granting the Charneys' petition for certiorari.

III.

NO CONFLICT EXISTS AMONG THE STATE COURTS CONCERNING THE CONSTITUTIONALITY OF WITNESS IMMUNITY AS APPLIED TO EXPERTS.

The Charneys ask this Court to grant their petition for a writ of certiorari primarily based on their contention that a conflict exists among the various state supreme courts concerning immunity against suit for testimony by expert witnesses. An examination of the cases cited by the Charneys for this proposition show that no such conflict exists. None of the cases deal with any constitutional issue. In the cases relied upon by the Charneys, *Bruce v. Byrne-Stevens & Assoc. Eng., Inc.*, 113 Wash. 2d 123, 776 P.2d 666 (1989); *James v. Brown*, 637 S.W. 2d 914 (Tex. 1982); *Levine v. Wiss & Co.*, 97 N.J. 242, 478 A.2d 397 (1984); *Matco Forge, Inc. v. Arthur Young & Co.*, 5 Cal. App. 4th 392, 6 Cal. Reptr. 2d 781 (1992) and *Murphy v. A.A. Mathews,*

841 S.W. 2d 671 (Mo. 1992), the courts decided the applicability or lack of applicability of the expert immunity based on their interpretation of the common law and statutes of their respective states. None of these decisions ever mention any federal constitutional problem with witness or expert immunity. The Pennsylvania courts in dealing with the Charneys' claim never discussed any constitutional claim or problem relating to witness or expert immunity.

The Charneys ask this Court to federalize the common law of the fifty states. They want this Court to decide what Pennsylvania law should be concerning expert immunity. They request that this Court set itself up as a super state supreme court for all fifty states. No reason exists to accept this extraordinary invitation. To do so results in a major infringement on the rights of the states to determine their own common law.

This Court stated in *Braxton v. United States*, 500 U.S. 344 (1991):

> A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. See this Court's Rule 10.1.

Id. at 500 U.S. at 345.

In the case now before this Court no conflict exists among the state courts concerning any provision of federal law. No reason exists for this Court to determine what the common law of Pennsylvania should be concerning witness immunity.

IV.

THIS COURT IN *BRISCOE V. LAHUE*, 460 U.S. 325 (1983) HAS ALREADY DECIDED THAT THE UTILIZATION OF WITNESS IMMUNITY CREATES NO CONSTITUTIONAL VIOLATION.

This Court has on many occasions upheld the utilization of common law immunities to bar or limit constitutional claims. In *Briscoe v. LaHue*, 460 U.S. 325 (1983) plaintiffs brought a claim pursuant to 42 U.S.C. § 1983 contending that local police officers had violated their constitutional rights to due process pursuant to the Fourteenth Amendment of the United States Constitution by providing perjured testimony at the plaintiffs' criminal trials resulting in their unfair and unlawful conviction for crimes that they claim they never committed. This Court concluded that common law witness immunity barred the constitutional claims of the plaintiffs.

The analysis of this Court results in the Charneys having no constitutional claim. If a common law immunity bars a federal cause of action for a constitutional violation, how can the utilization of that same common law immunity to bar a state law claim devoid of any constitutional dimension raise a constitutional question? It cannot as a matter of law.

V.

GRANTING REVIEW IN THIS CASE WILL RESULT IN CHAOS AND CONFUSION IN THE STATE COURTS OF ALL FIFTY STATES BECAUSE IT WILL CAST INTO DOUBT THE VALIDITY OF EVERY QUALIFIED IMMUNITY OR COMMON LAW IMMUNITY UTILIZED BY THOSE STATES AS DEFENSES TO STATE LAW CAUSES OF ACTION.

The granting of certiorari by this Court will result in confusion and chaos in the courts of the fifty states. Every plaintiff in every civil action in which any kind of immunity defense exists based on the common law of the various states will seek to overcome that immunity by alleging a constitutional violation. This results in the federalization of the common law of the fifty states. The fifty state supreme courts will lose in large measure the ability to determine what common law immunities they wish to apply and the scope of those immunities. It casts into doubt settled case law in all of the states.

The Charneys concede that the issue that they raise affects thousands of law suits. Multiply those thousands of law suits by the number of times immunity defenses occur in all tort actions in all the fifty states. A tidal wave of constitutional litigation results from granting certiorari in this case. What purpose does the creation of such a tidal wave serve?

No indication exists that the state courts have been unable to determine for themselves whether to apply common law immunities. Our federal constitution requires that this Court permit the state supreme courts to follow different paths from each other in developing their common law. This diversity encourages new ideas and experimentation. The constitutionalization of the development of the common law

puts an end to the federal system as we know it. It creates an intellectual straight jacket which stifles creativity and diversity.

VI.

AN ALTERNATIVE BASIS EXISTED FOR THE DISMISSAL OF EACH OF THE COUNTS OF THE AMENDED COMPLAINT INDEPENDENT OF EXPERT IMMUNITY.

This Court never decides constitutional issues if it can resolve a claim by other means. In this case, Dr. Panitz challenged the amended complaint of the Charneys on grounds other than expert immunity.

This Court need not decide the Charneys' challenge to expert testimony. Independent grounds exist to dismiss the amended complaint. The entire amended complaint suffers from a serious defect arising pursuant to the law of the Commonwealth of Pennsylvania. The allegations of the amended complaint depend upon the prior deposition testimony of Dr. Panitz in the *Crown Point* litigation. The Charneys concede that they relied exclusively upon that deposition testimony to form their belief as to Dr. Panitz' proposed testimony at trial. An examination of that testimony, attached to the amended complaint as an exhibit, shows that no basis for such reliance exists as a matter of law. Dr. Panitz indicated that she could not even explain why certain individuals who were sensitized to formaldehyde failed to react to cigarette smoke. She came up with a *possible* explanation but indicated that she *could not* really explain it. (Petitioners' Appendix 30a and 31a).

Other independent reasons exist to support the dismissal of all the counts in the amended complaint against Dr. Panitz. Dr. Panitz appropriately raised these alternative grounds in her preliminary objections. (Petitioners' Appendix 37a to 42a).

VII.

NO BASIS EXISTS FOR THIS COURT TO REVIEW THE SUPERIOR COURT OF PENNSYLVANIA'S AWARD OF ATTORNEYS FEES PURSUANT TO PENNSYLVANIA RULE OF APPELLATE PROCEDURE 2744 WHEN NO CONSTITUTIONAL ISSUES EXIST AND WHEN THE COURT EXERCISED ITS LEGITIMATE DISCRETION IN DETERMINING THAT THE APPEAL OF THE PETITIONERS WAS FRIVOLOUS SINCE IT RAISED AN ISSUE ALREADY DECIDED IN THE VERY SAME CASE SEVEN MONTHS BEFORE.

The Superior Court of Pennsylvania properly exercised its discretion in awarding attorneys fees pursuant to Pennsylvania Rule of Appellate Procedure 2744. That rule states that a Pennsylvania Appellate Court may award reasonable counsel fees and damages for delay:

> . . . if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious. The appellate court may remand the case to the trial court to determine the amount of damages authorized by this rule.

The appeal of the Charneys was frivolous because the realistic chances of ultimate success were slight and continuation of the contest was unreasonable. (Petitioners' Appendix 4a and 5a). An examination of the facts before the Superior Court supports that decision. Counsel for the Charneys, Behrend & Ernsberger, litigated the exact same issue presented by the Charneys in the exact same case before the Superior Court seven months before the appeal of the Charneys.

The decision in that case, *Panitz v. Behrend, supra*, 632 A.2d 562 bound the Superior Court as to the Charneys' claim. The Charneys knew that this decision mandated the defeat of their amended complaint.

According to the Charneys, the possibility that the Supreme Court could overrule the decision of the Superior Court in *Panitz, supra,* permitted them to ask the Superior Court to disregard its own recent ruling. This means that no appeal could ever be frivolous since the possibility of reversal by the Pennsylvania Supreme Court always exists. This argument establishes too much. At some point, the Superior Court must be able to tell parties that appealing the same issue that has just been litigated adversely to them will result in the imposition of sanctions. Otherwise, parties will be encouraged to file frivolous appeals. An already overwhelmed Superior Court will be inundated with meritless appeals concerning issues which the court has already decided many times over.

The Charneys had adequate notice of the request of Dr. Panitz for attorneys fees. It appeared in her brief in the Superior Court. The Charneys had the opportunity to address the issue in a reply brief and at oral argument. (Respondents' Appendix 3a to 4a).

The Charneys ask this Court to infringe upon a state appellate court's discretion in determining when a party has acted in a frivolous manner. This issue presents no constitutional claim. State courts must have the same rights that the federal courts do to control their docket and to penalize parties and attorneys who inappropriately and unfairly subvert the smooth functioning of their courts.

The Charneys never identify the nature of their constitutional violation. They make one conclusory statement

that the order for counsel fees violated the Fifth and Fourteenth Amendments of the Constitution of the United States. How?

They rely on this Court's opinion in *Roadway Express v. Piper*, 447 U.S. 752 (1980). But this Court in that decision never dealt with any constitutional claim. Instead, this Court interpreted various statutes enacted by congress relating to the imposition of costs and attorneys fees. No constitutional issue appeared in that case. This Court decided no constitutional claim in that case.

The Charneys wish this Court to infringe upon the ability of the Pennsylvania appellate courts to control the conduct of the parties and attorneys appearing before it. In this case the Charneys filed an appeal raising an issue already decided against their counsel in the same case seven months before. They presented no new argument. They presented no new case law. This fails to raise any constitutional claim. Instead, it displays the need for state courts to have the same power that this Court has to control frivolous litigation.

The Charneys still have the opportunity to challenge the amount of the attorneys' fees in the trial court. The Superior Court directed the trial court to determine the amount of the attorneys' fees. The trial court has not done this yet. It is premature to review the attorneys' fee issue.

CONCLUSION

In the light of the foregoing, Elaine B. Panitz, M.D. respectfully requests that this Court deny the petition for certiorari of the Charneys.

Respectfully submitted,

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APPENDIX A — PETITIONERS' STATEMENT OF THE QUESTIONS INVOLVED IN THE SUPERIOR COURT

STATEMENT OF THE QUESTIONS INVOLVED

I. **WHETHER THE TORTIOUS ACTS OF AN EXPERT, COMMITTED TO ENGAGE AND RETAIN THE EXPERT'S EMPLOYMENT BY A LITIGANT AND/OR THEIR COUNSEL IN A CIVIL ACTION, SHOULD BE EXCUSED FROM CIVIL LIABILITY BECAUSE, OR IF, THAT EXPERT SUBSEQUENTLY TESTIFIES AT THE LITIGANT'S TRIAL.**

Answered in the Affirmative by the Court below.

II. **WHETHER WITNESS IMMUNITY FROM CIVIL LIABILITY FOR COMMUNICATIONS IN JUDICIAL PROCEEDINGS SHOULD BE EXPANDED SO AS TO INCLUDE EVEN THE PRELIMINARY, INITIAL CONTACT BETWEEN AN EXPERT AND A PARTY, BEFORE THE EXPERT IS HIRED TO TESTIFY OR BEFORE A FINAL DECISION HAS BEEN MADE BY THE PARTY AS TO WHETHER THE EXPERT WILL TESTIFY AS A WITNESS.**

Answered in the Affirmative by the Court below.

III. **WHETHER AN EXPERT WITNESS, WHO REPRESENTS THEIR EXPERT OPINION TO BB ONE THING, AND IS THEN RETAINED BY A PARTY AND/OR THEIR ATTORNEY TO TESTIFY ON THAT PARTY'S BEHALF AT TRIAL, HAS A DUTY TO INFORM THE HIRING PARTY AND/OR THEIR ATTORNEY OF A CHANGE IN THAT EXPERT'S**

Appendix A

OPINION FROM WHAT HAD BEEN REPRESENTED, PRIOR TO TRIAL, SO THAT PARTY AND THEIR ATTORNEY CAN MAKE INFORMED DECISIONS REGARDING THE CONDUCT OF THAT PARTY'S CASE INCLUDING THE POSSIBLE SETTLEMENT THEREOF.

Answered in the Negative by the Court below.

IV. **WHETHER IN GRANTING WITNESS IMMUNITY FROM CIVIL LIABILITY FOR COMMUNICATIONS MADE PRIOR TO TRIAL, THE COURT SHOULD MAKE A DISTINCTION BETWEEN, AND APPLY DIFFERENT STANDARDS TO, EXPERT WITNESSES AND FACT WITNESSES.**

Answered in the Negative by the Court below.

APPENDIX B — PETITIONERS' STATEMENT OF THE QUESTIONS INVOLVED IN THE PENNSYLVANIA SUPREME COURT

STATEMENT OF THE QUESTIONS INVOLVED

I. **SUBSTANTIATIVE QUESTION OF FIRST IMPRESSION: SHOULD THE SUPREME COURT OF PENNSYLVANIA EXTEND THE PRIVILEGE OF WITNESS IMMUNITY BEYOND THE TRADITIONAL APPROACH ACCEPTED IN THIS COMMONWEALTH WHERE A WITNESS THAT IS ADVERSE CANNOT BE SUED IN A SUBSEQUENT ACTION FOR DEFAMATION, DEFAMATION-TYPE CLAIM OR A RETALIATORY TYPE CLAIM BASED UPON THE ADVERSE TESTIMONY, TO INCLUDE A PROFESSIONAL WHO AGREES TO SERVE AS AN ADVOCATE FOR THE PARTY'S POSITION AND TO PROVIDE LITIGATION-RELATED SERVICES FOR COMPENSATION, IF THERE IS PROFESSIONAL NEGLIGENCE IN PROVIDING THE AGREED SERVICES?**

ANSWER: In the Affirmative by the Superior Court.

II. **ADDITIONAL SUBSTANTIVE QUESTION OF FIRST IMPRESSION: SHOULD THE SUPERIOR COURT OF PENNSYLVANIA BE PERMITTED TO ASSESS A PARTY COUNSEL FEES FOR APPEALING A CASE TO THE SUPERIOR COURT WHEN THE CONTROLLING AND DECIDING ISSUE IS AN ISSUE OF FIRST IMPRESSION, AND HAS NEVER (SIC) DECIDED BY THE SUPREME COURT OF PENNSYLVANIA?**

ANSWER: In the Affirmative by the Superior Court.

Appendix B

III. MAY THE TRIAL COURT AFFIRMED BY THE SUPERIOR COURT, MAKE A FACTUAL FINDING, ESSENTIAL TO ITS DECISION, WHICH IS NOT CONTAINED IN AND IS CONTRARY TO THE PLEADINGS OF APPELLANT-PLAINTIFF, WHERE THE ONLY FACTS BEFORE THE COURT ARE PLEADINGS, THERE HAVING BEEN NO TESTIMONY?

ANSWER: In the Affirmative by the Superior Court.